

AUG 01 2001
FEDERAL ELECTION
COMMISSION
SECRETARIAT

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

2001 AUG -1 A 10: 37

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5001

DATE COMPLAINT FILED: April 17, 2000

DATE OF NOTIFICATION: April 21, 2000

DATE ACTIVATED: June 5, 2001

EXPIRATION OF STATUTE OF
LIMITATIONS: April 11, 2005

STAFF MEMBER: Eric A. Hartlaub

COMPLAINANT: Rickey Jamerson

RESPONDENTS: Charlie A. Dooley
Dooley for Congress Committee and
Everet Ballard, as treasurer

RELEVANT STATUTES: 2 U.S.C. § 441d (a)
11 C.F.R. § 100.22

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

On April 17, 2000, Rickey Jamerson ("Complainant") submitted a complaint to the Federal Election Commission. The complaint alleges that Charlie A. Dooley violated the Federal Election Campaign Act by distributing campaign literature which did not include a proper disclaimer. The Dooley campaign distributed the literature during the 2000 election for U.S. Representative in Missouri's 1st Congressional District.

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. The Law**

3 The Federal Election Campaign Act of 1971, as amended ("the Act"), provides that
4 whenever any person makes an expenditure for the purpose of financing communications
5 expressly advocating the election or defeat of a clearly identified candidate through any direct
6 mailing or any other type of general public political advertising, such communication, if paid for
7 and authorized by the candidate or an authorized political committee of a candidate, must clearly
8 display a disclaimer that the communication has been paid for by such authorized political
9 committee. 2 U.S.C. § 441d(a). Such a disclaimer must appear in a clear and conspicuous
10 manner to give the reader adequate notice of the identity of the political committee that paid for,
11 and, where required, that authorized the communication. 11 C.F.R.
12 § 110.11(a)(5). Each communication, if mailed separately, or included in a package of materials,
13 must contain the required disclaimer. 11 C.F.R. § 110.11(a)(5)(ii).

14 Pursuant to 11 C.F.R. § 100.22,

15 Expressly advocating means any communication that –

- 16 (a) uses phrases such as "vote for the President," "re-elect your
17 Congressman," "support the Democratic nominee," "cast your
18 ballot for the Republican challenger for U.S. Senate in Georgia,"
19 "Smith for Congress," "Bill McKay in '94," "vote Pro-Life," or
20 "vote Pro-Choice" accompanied by a listing of clearly identified
21 candidates described as Pro-Life or Pro-Choice, "vote against
22 Old Hickory," "defeat" accompanied by a picture of one or more
23 candidate(s), "reject the incumbent," or communications of
24 campaign slogan(s) or individual word(s), which in context can
25 have no other reasonable meaning than to urge the election or
26 defeat of one or more clearly identified candidate(s), such as
27 posters or bumper stickers, advertisements, etc. which say
28

1 "Nixon's the One," "Carter '76", "Reagan/Bush," or "Mondale!";¹

2 Recently, the issue of express advocacy was addressed in *FEC v. Christian*
3 *Coalition*, 52 F.Supp. 2d 45 (D.C. D.C. 1999) ("*Christian Coalition*"). Based on
4 prior case law in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d. 659
5 (1976) ("*Buckley*"), the *Christian Coalition* court reasoned:

6 [T]hat verb or its immediate equivalent – considered in the
7 context of the entire communication, including its temporal
8 proximity to the election – must unmistakably exhort the reader/
9 viewer/listener to take electoral action to support the election or
10 defeat of a clearly identified candidate. The most obvious electoral
11 action is to vote for or against the candidate. But as the *Buckley*
12 Court recognized when it included the verb "support" in its non-
13 exclusive list, *see* 424 U.S. at 44 n. 52, 96 S.Ct. 612, express
14 advocacy also includes verbs that exhort one to campaign for, or
15 contribute to, a clearly identified candidate.

16 *Christian Coalition* at 61-62. But see *FEC v. Freedom's Heritage Forum*, Civ.
17 Action No. 3:98cv-549-S (W.D. Ky. February 4, 2000) (soliciting assistance in
18 campaigning for the candidate is not express advocacy).

19 The term "clearly identified" means that the name, nickname, photograph, or drawing of
20 the candidate involved appears or that the identity of the candidate is otherwise apparent through
21 an unambiguous reference such as "the President" and "your Congressman." 2 U.S.C.
22 § 431(18)(A) and 11 C.F.R. § 100.17.
23
24

¹ Two appellate courts have determined that part (b) of this regulation is invalid. *Maine Right to Life v. FEC*, 98 F.3d 1 (1st Cir. 1996) and *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997). On September 22 1999, the Commission unanimously adopted a statement formalizing a pre-existing policy of not enforcing subsection (b) in the First and Fourth Circuits. In January 2000, a district court in Virginia issued a nationwide injunction preventing the Commission from enforcing 11 C.F.R. § 100.22(b) anywhere in the country. *Virginia Society for Human Life, Inc. v. FEC*, 83 F.Supp.2d 668 (E.D. Va. 2000). The FEC has filed an appeal of the injunction.

1 B. The Facts

2 Charlie Dooley campaigned for U.S. Representative in the August 8, 2000 primary
3 election in Missouri's 1st Congressional District. During the campaign, Mr. Dooley's Committee
4 authorized and paid for the printing and distribution of campaign literature which expressly
5 advocates the election of Mr. Dooley for Congress. Attachment 1. The campaign distributed the
6 literature as a pamphlet entitled "Campaign News." The pamphlet prominently displays the
7 Dooley campaign seal. However, the material lacks a disclaimer.

8 The campaign pamphlet consists of three pages of recent endorsements for Dooley's
9 candidacy for Congress and quotations from endorsers. See Attachment 1. Phrases such as
10 "Charlie Dooley for Congress," "ensure a Dooley victory in the primary," and "Charlie Dooley
11 their choice in the 1st District" are contained in the newsletter. The final page of the pamphlet
12 consists of a letter written by Mr. Dooley addressed "to my labor friends" which includes such
13 language as "I am asking for your consideration and endorsement" and "with your help, I will
14 take those values to Washington." *Id.*, at 4.

15 The Dooley campaign admits in its response that due to an oversight the material in
16 question lacked a disclaimer. Attachment 2. The Dooley campaign states that only a small
17 number (250) of these items were photocopied and not all of the items in question were
18 distributed. See Attachment 2. The campaign also asserts that of the pamphlets that were
19 distributed a vast majority were enclosed in envelopes from the campaign which clearly had a
20 printed disclaimer. The Dooley campaign added that "... it was simply an error. It is the
21 campaign's regular practice to include the disclaimer on printed materials." *Id.* The text of the
22 Dooley campaign response refers to enclosures consisting of a receipt which verifies the
23 photocopying costs of the campaign literature and the campaign envelopes that were used to

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1 distribute the material. *Id.* Those enclosures, however, were not found to be attached to the
2 campaign's response. In any event, even if the disclaimer was on the envelopes, 2 U.S.C.
3 § 441d(a) would not have been satisfied because C.F.R. § 110.11(a)(5)(ii) requires all separately
4 packaged materials to have a disclaimer.

5 C. Discussion and Analysis

6 The contents of Mr. Dooley's campaign literature, contain among other things, statements
7 expressly advocating the election of Mr. Dooley for Congress pursuant to 11 C.F.R. § 100.22(a).
8 Phrases such as "Charlie Dooley for Congress," "ensure a Dooley victory in the primary," and
9 "Charlie Dooley their choice in the 1st District" all expressly advocate the election of Mr. Dooley
10 and clearly identify him as the candidate. In addition, the literature informs the reader that Mr.
11 Dooley received endorsements from a variety of local leaders including mayors and ministers.
12 For example, "Buzz Westfall immediately announced his endorsement and publicly declared his
13 "enthusiastic support" for Charlie." See Attachment 1, Page 1. Mr. Dooley's own letter in the
14 pamphlet encourages his "labor friends" to consider him and endorse him. The *Christian*
15 *Coalition* court analyzed that "as the *Buckley* Court recognized when it included the verb
16 "support" in its non-exclusive list, . . . , express advocacy also includes verbs that exhort one to
17 campaign for, or contribute to, a clearly identified candidate." *Id.* at 62. Mr. Dooley's explicit
18 request for endorsements is a request for support that constitutes the express advocacy of his
19 election.

20 The Dooley campaign paid for, authorized, and distributed the pamphlets to the public.
21 Accordingly, pursuant to 2 U.S.C. § 441d(a)(1), these items required a disclaimer stating that
22 they had been paid for by the Committee. The pamphlets do not contain the required disclaimer.
23 The Dooley campaign admits that the Committee failed to include disclaimers on these items.

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Therefore, this office recommends that the Commission find reason to believe that the Dooley for Congress Committee and Everet Ballard, as treasurer, violated 2 U.S.C. § 441d(a).

Due to the Committee producing a small number of pamphlets (250), a number of those pamphlets not being disseminated, and the campaign's acknowledgment of its error, this Office further recommends that the Commission take no further action against the Committee, send an admonishment letter, and close the file in this matter.

III. RECOMMENDATION

Find reason to believe that Dooley for Congress Committee and Everet Ballard, as treasurer, violated 2 U.S.C. § 441d(a), but take no further action, send an admonishment letter and close the file.

Lois G. Lerner
Acting General Counsel

7/31/01
Date

BY: Abigail A. Shaine
Abigail A. Shaine
Acting Associate General Counsel

Attachments:

1. Campaign Pamphlet
2. Copy of Response to Complaint



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel *OGC*

DATE: August 1, 2001

SUBJECT: MUR 5001 – First General Counsel's Report

The attached is submitted as an Agenda document for the Commission Meeting of _____

Open Session _____

Closed Session _____

CIRCULATIONS

DISTRIBUTION

SENSITIVE

☒

NON-SENSITIVE

☐

72 Hour TALLY VOTE ☒

24 Hour TALLY VOTE ☐

24 Hour NO OBJECTION ☐

INFORMATION ☐

96 Hour TALLY VOTE ☐

COMPLIANCE

☒

Open/Closed Letters ☐

MUR ☐

DSP ☐

STATUS SHEETS ☐

Enforcement ☐

Litigation ☐

PFESP ☐

RATING SHEETS ☐

AUDIT MATTERS ☐

LITIGATION ☐

ADVISORY OPINIONS ☐

REGULATIONS ☐


OTHER ☐



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Lois Lerner
Acting General Counsel

FROM: Office of the Commission Secretary 

DATE: August 6, 2001

SUBJECT: MUR 5001 - First General Counsel's Report
dated July 31, 2001

The above-captioned document was circulated to the Commission
on Wednesday, August 1, 2001

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Mason	—
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Smith	<u>XXX</u>
Commissioner Thomas	—
Commissioner Wold	—

This matter will be placed on the meeting agenda for

Tuesday, August 14, 2001

Please notify us who will represent your Division before the Commission on this matter.

21-04-405-2423